



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 171 OF 1992

IN THE MATTER OF THE ESTATE OF KANAMPIU MPUNGI.....(DECEASED)

M'NDUBI KANAMPIU.....PETITIONER/APPLICANT

VERSUS

M'KAARIA KANAMPIU...INTERESTED PARTY/RESPONDENT

J U D G M E N T

1. The court in its judgment dated 13th November, 2012 appointed the two petitioners herein as joint administrators of the deceased estate and directed that the two should forthwith file an application for confirmation of grant of the deceased estate within 30 days from the said date. Grant of letters of administration intestate of the deceased estate was issued to the two administrators on 13th November, 2013. The 2nd administrator M'Kaaria Kanampiu filed summons for confirmation of grant on 15th February, 2013.

2. The 1st administrator/respondent filed affidavit of protest dated 26th April, 2013 objecting to the mode of distribution proposed by the 2nd administrator. John Muthomi a grandson to the deceased also filed affidavit of protest and associated himself with the protest by the 1st administrator. The 2nd administrator filed further affidavits in support of confirmation of grant and in reply to affidavit of protest dated 9th September, 2013. The parties sought direction that the protest be determined by way of viva voce evidence. The protestors gave evidence though PW1 John Muthomi and called no witnesses whereas the 2nd administrator gave evidence and called no witness.

3. The `protestor's case is that the deceased was grandfather to John Muthomi Ndubi, PW1. That he died on 5/10/1998 and was survived by (1) Kaaria Kanampiu, (2) Kirubi Kanampiu; (3) M'Ndubi Kanampiu and (4) M'Mutuwa Raini Kanampiu deceased. That he was also survived by the following grandsons:-

i. Kaboria Kaaria

ii. M' M' Mutuwa Raini

iii. John Muthomi Ndubi (PW1)

iv. That the deceased assets were stated to be:-

i. Mwimbi/Kiraro/146 measuring 3 ½ acres

ii. Mwimbi/Kiraro/661 measuring 3 acres and that he had given part of this land to the following:-

I. Kaaria Kanampiu, land Mwimbi/Kiraro/148 of 7 ½ acres

II. M'Mutuwa Raini Kanampiu, Mwimbi/Kiraro/143 of 3 acres.

He averred the lands were given in 1974.

4. The protestor opposed the mode of distribution proposed by the 2nd administrator on the grounds that it was not equal to beneficiaries, contending that Kaaria Kanampiu has a land at Mwimbi/Kiraro/148 and 661 as plot number 661 is in the name of Dickson Kaborio Kaaria which he has sold partly but is yet to be subdivided. He contended plot No. 146 and 661 are registered in different names other than those of the deceased. He contended plot 146 was registered in the name of M'Ndubi Kanampiu but was later transferred to himself and plot No. 661 into the name of Dickson Kaboria Kaaria. That it was later subdivided on 27/3/2001 into plots numbers 1222 and 1223. He further opposed the distribution as a grandson since Mbii M'Raini and Dickson Kaboria who had been given land are grandsons to the deceased and he has not been given any. He further contended that the household of M'Kaaria Kanampiu has a big portion than any other houses. He proposed the house of M'Kaaria Kanampiu should remain on Mwimbi/Kiraro/661. That Mwimbi/Kiraro/143 to go to M'Raini and his family. That Plot Mwimbi/Kiraro 146/ should go to M'Ndubi Kanampiu and his family. During cross-examination PW1 testified that the deceased had given land parcel Mwimbi/Kiraro/148 to Kaaria Kanampiu claiming he had evidence and a green card which was with his advocate; however he agreed he had no evidence that the land was even registered in the name of the deceased herein. The witness claimed the land was given in 1974 when he was only 5 years old but he was only told of it. On Plot No. Mwimbi/Kiraro/143 he admitted he had no documentary evidence over its transaction nor that it was even owned or registered in the deceased name. On plot NO. 661 he admitted that it is in the name of Dickson Kaboria but he did know its actual size. He admitted he was not sure whether it was the wish of the deceased that plot 661 b inherited by Dickson Kaboria, adding that plot No. 146 is 3 ½ acres.

5. The 2nd administrator M'Kaaria Kanampiu son to the deceased testified that the deceased had 4(four) sons as given by the protestor all of whom are alive except Kirumi a daughter to the deceased and M'Raini son of the deceased. He gave the names of the deceased grandsons as follows:-

i. John Muthomi PW1 son of M'Ndubi who is alive

ii. Mbii son of M'Raini

iii. Kaboria his son.

6. DW1 listed the deceased parcels of land as two being the following:-

i. Mwimbi/Kiraro/146

ii. Mwimbi/Kiraro/661 and proposed distribution as

follows:-

A. Mwimbi/Kiraro/146 to the following:

I. M'Kaaria Kanampiu

II. M'Ndubi Kanampiu

III. Mbii M'Raini in equal shares so that each gets 1.31 acres.

B. Mwimbi/Kiraro/661 to go to Kaboria as he had given been given the same by the deceased and sold it. He testified that Kaboria had been given the by the deceased during his lifetime; though it was not transferred he had sold part of it to Antony Kinyua as per green card now Mwimbi/Kiraro/1222 as per exhibit1. He also produced green card for plot Nos.Mwimbi/Kiraro/1711 as exhibit 2 which was created from subdivision of Mwimbi/Kiraro/1223 creating plot No's Mwimbi/Kiraro/1711 and 1712. He averred plot No. 1712 is in the name of Dickson Kaboria as per exhibit D4. He urged plot No. 1712 should to go Dickson Kaboria.

7. On plot No. Mwimbi/Kiraro/148 he testified that land was never owned by the deceased but it was owned by him. He produced green card as exhibit D5 showing he was first registered proprietor of the land. He further testified that land 143 was never given to M'Raini by the deceased as alleged by the protestors He stated the land do not exist and that he has never been aware of it.

8. During cross-examination of DW1. He confirmed that Mwimbi/Kiraro/148 is in his name and he was registered during land adjudication process. He reiterated that the land never belonged to the deceased. He testified that PW1 John Muthomi should get his share from his father. On Plot 661 he reiterated the same was given to Dickson Kaburia by the deceased and what is now remaining his plot 1712 in Kaburia's name. He averred that the same is not part of the deceased but estate but is property of his son Dickson Kaburia as Ndubi effected transfer into DW1's son's name.

9. I have carefully considered the application for confirmation of the grant; affidavit in support, protest by M'Ndubi Kanampiu and John Muthomi, further affidavit in support for confirmation of grant and reply to affidavit of protest; the evidence adduced by the protestor and the 2nd administrator; the filed submissions, as well as the relevant provisions of the Law of Succession Act. The issue for determination after considering the pleadings and evidence of the parties as well as submissions is who are the beneficiaries to the deceased estate; what are the assets comprising of the deceased estate; whether the deceased had during his life time gifted his properties to his beneficiaries and if so to whom; and lastly how should the deceased properties be shared in light of the proposal by the 2nd administrator and the 1st administrator and John Muthomi as a protestor.

10. **Section 29(a) and (b) of the Law of Succession Act** defines who are the dependants of a deceased person. It includes children of the deceased and grandsons. I therefore find that the parties in this cause being a child and grandson of the deceased to be beneficiaries to the deceased estate. They include the living sons of the deceased and grandsons of the deceased who represent their deceased father's interest as listed by both administrators in their respective mode of distribution.

5. The 1st administrator/protestor in his affidavit of protest listed the deceased assets as Mwimbi/Kiraro/146, measuring 1.6 hectares; and 661 measuring 1.2 hectares, Mwimbi/Kiraro/148 which he averred was gifted to M'kaaria Kanampiu and Mwimbi/Kiraro/143 gifted to M'Raini Kanampiu. The 2nd administrator on the other hand listed deceased assets as comprising of land parcel No. Mwimbi/Kiraro/661 which he had gifted to his grandson Dickson Kaboria Kaaria and Mwimbi/Kiraro/146. PW1 in his evidence averred that Mwimbi/Kiraro/148, 146 and 143 was part

of the deceased estate. The 1st administrator on the other hand did not give evidence to support his contention on the lands he had purported to belong to the deceased whereas the 2nd administrator gave evidence and produced exhibits D1 showing Mwimbi/Kiraro/661 was subdivided and created number 1222 in the name of Dickson Kiboria Kaaria who transferred it to Antony Kinyua Justus creating number 1711 as per exhibit D2, and 1712 into the name of Dickson Kaboria as per exhibit D4. Exhibit 5 show that Mwimbi/Kiraro/148 was on 15/5/1972 registered for the first time into the 2nd administrator's name. The 2nd administrator testified that Mwimbi/Kiraro/143 does not exist. PW1 in his evidence admitted that he did not have any documentary evidence to support that plot Number Mwimbi/Kiraro/148 and 143 were gifted to 2nd petitioner and M'Rani Kanampiu (deceased) respectively by the deceased. The protestors failed to prove on balance of probabilities that Mwimbi/Kiraro/148 was owned by the deceased at any one time and was gifted to the 2nd administrator. They similarly failed to proof the existence of Mwimbi/Kiraro/143 and of the same being gifted to M'Rani Kanampiu (deceased). The protestors did not controvert the gifting of Mwimbi/Kiraro/661 to Dickson Kiboria Kaaria by the deceased during his life time. I therefore find and hold the deceased assets comprised of Mwimbi/Kiraro/146 and Mwimbi/Kiraro/661 which was gifted to Dickson Kaboria Kaaria and who subdivided the same into 1122 and 1223 leading to further subdivision to 1711 and 1712 from 1222 and Dickson retaining plot No.1712.

6. Having settled the issue of the dependants and finding that the only deceased son of the deceased is M'Rani Kanampiu who is survived by PW1, the 2nd protestor and having considered the parties modes of distribution, I find that each son of the deceased is entitled to a share of the deceased estate and as M'Rani Kanampiu is dead his son should get his respective share. The mode of distribution proposed by the 2nd administrator is fair, reasonable, and takes into account of all deceased children interest and also considers the property gifted to Dickson Kaboria Kaaria, which gifting has not been controverted by the protestors in their affidavits or by way of evidence. I am therefore satisfied the said property Mwimbi/Kiraro/661 which was subdivided creating plots No's 1222, and 1223 and further subdivision crating 1711 and 1712 is property of Dickson Kaboria Kaaria. I therefore order the deceased estate be distributed as follows:-

A. Parcel Land No. Mwimbi/Kiraro/146

- | | |
|---|---|
| <i>Kanampiu – 1.3 acres</i> | <i>I. M'Kaaria</i> |
| | <i>II. M'Ndubi Kanampiu</i> |
| | <i>father to PW1 John Muthomi, from whom John Muthomi should get</i> |
| | <i>share or interest – 1.3 acres</i> |
| | <i>III. Mbii M'Rani son of</i> |
| <i>M'Rani Kanampiu(deceased)</i> | <i>- 1.3 acres</i> |

(B) Mwimbi/Kiraro/661

Subdivided into 1222, 1223 to 1711 and 1712) leaving 712 in the name of Dickson Kiboria M'Kaaria to go to Dickson Kiboria Kaaria.

C. Each party to bear its own costs as the administrators are brothers.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

1) Mr. J. G. Gitonga for 2nd applicant

2) Mr. I.C. Mugo for protestors.

J. A. MAKAU

JUDGE